

RIGHT TO KNOW ADVISORY COMMITTEE LEGISLATIVE SUBCOMMITTEE

DRAFT AGENDA

October 3, 2013

9:00 a.m.

Room 126, State House, Augusta

Convene

1. Welcome and Introductions
Judy Meyer, Chair
2. Issues raised in LD 258, An Act To Implement the Recommendations of the Right To Know Advisory Committee Concerning Meetings of Public Bodies;
3. Encryption of emergency communications
 - Summaries of 2012 Encryption Subcommittee meetings
 - Proposed legislation, allocated and unallocated
4. Other?
5. Schedule additional meetings

Note: The Legislative Subcommittee meets jointly with the Public Policy Committee on October 3, 2013 at 10:00 a.m.

Adjourn



126th MAINE LEGISLATURE

FIRST REGULAR SESSION-2013

Legislative Document

No. 258

H.P. 195

House of Representatives, February 5, 2013

An Act To Implement the Recommendations of the Right To Know Advisory Committee Concerning Meetings of Public Bodies

Reported by Representative PRIEST of Brunswick for the Joint Standing Committee on
Judiciary pursuant to the Maine Revised Statutes, Title 1, section 411, subsection 6, paragraph
G.

Reference to the Committee on Judiciary suggested and ordered printed pursuant to Joint
Rule 218.

Millicent M. MacFarland
MILLCENT M. MacFARLAND
Clerk

1 Be it enacted by the People of the State of Maine as follows:

2 PART A

3 Sec. A-1. 1 MRSA §403-A is enacted to read:

4 **§403-A. Public proceedings through other means of communication**

5 This section governs public proceedings, including executive sessions, during which
6 public or governmental business is discussed or transacted through telephonic, video,
7 electronic or other similar means of communication.

8 **1. Requirements.** A body subject to this subchapter may conduct a public
9 proceeding during which a member of the body participates in the discussion or
10 transaction of public or governmental business through telephonic, video, electronic or
11 other similar means of communication only if the following requirements are met:

12 A. The body has adopted a policy that authorizes a member of the body who is not
13 physically present to participate in a public proceeding through telephonic, video,
14 electronic or other similar means of communication in accordance with this section.
15 The policy may establish circumstances under which a member may participate when
16 not physically present;

17 B. Notice of the public proceeding has been given in accordance with section 406;

18 C. Except as provided in subsection 3, a quorum of the body is assembled physically
19 at the location identified in the notice required by section 406;

20 D. Each member of the body participating in the public proceeding is able to hear all
21 the other members and speak to all the other members during the public proceeding,
22 and members of the public attending the public proceeding in the location identified
23 in the notice required by section 406 are able to hear all members participating from
24 other locations;

25 E. Each member who is not physically present and who is participating through
26 telephonic, video, electronic or other similar means of communication identifies the
27 persons present at the location from which the member is participating;

28 F. All votes taken during the public proceeding are taken by roll call vote; and

29 G. Each member who is not physically present and who is participating through
30 telephonic, video, electronic or other similar means of communication has received
31 prior to the public proceeding any documents or other materials that will be discussed
32 at the public proceeding, with substantially the same content as those documents
33 actually presented. Documents or other materials made available at the public
34 proceeding may be transmitted to the member not physically present during the
35 public proceeding if the transmission technology is available. Failure to comply with
36 this paragraph does not invalidate the action of a body in a public proceeding.

37 **2. Voting; judicial or quasi-judicial proceeding.** A member of a body who is not
38 physically present and who is participating in a judicial or quasi-judicial public
39 proceeding through telephonic, video, electronic or other similar means of

1 communication may not vote on any issue concerning testimony or other evidence
2 provided during the judicial or quasi-judicial public proceeding.

3 **3. Exception to quorum requirement.** A body may convene a public proceeding
4 by telephonic, video, electronic or other similar means of communication without a
5 quorum under subsection 1, paragraph C if:

6 A. An emergency has been declared in accordance with Title 22, section 802,
7 subsection 2-A or Title 37-B, section 742;

8 B. The public proceeding is necessary to take action to address the emergency; and

9 C. The body otherwise complies with the provisions of this section to the extent
10 practicable based on the circumstances of the emergency.

11 **4. Annual meeting.** If a body conducts one or more public proceedings pursuant to
12 this section, it shall also hold at least one public proceeding annually during which
13 members of the body in attendance are physically assembled at one location and where no
14 members of the body participate by telephonic, video, electronic or other similar means
15 of communication from a different location.

16 PART B

17 **Sec. B-1. 10 MRSA §384, sub-§5** is enacted to read:

18 **5. Meetings.** The board shall have a physical location for each meeting.
19 Notwithstanding Title 1, section 403-A, board members may participate in meetings by
20 teleconference. Board members participating in the meeting by teleconference are not
21 entitled to vote and are not considered present for the purposes of determining a quorum,
22 except in cases in which the chair of the board determines that the counting of members
23 participating by teleconference and the allowance of votes by those members is necessary
24 to avoid undue hardship to an applicant for an investment.

25 **Sec. B-2. 32 MRSA §88, sub-§1, ¶D**, as amended by PL 2007, c. 274, §19, is
26 further amended to read:

27 D. A majority of the members appointed and currently serving constitutes a quorum
28 for all purposes and no decision of the board may be made without a quorum present.
29 A majority vote of those present and voting is required for board action, except that
30 for purposes of either granting a waiver of any of its rules or deciding to pursue the
31 suspension or revocation of a license, the board may take action only if the proposed
32 waiver, suspension or revocation receives a favorable vote from at least 2/3 of the
33 members present and voting and from no less than a majority of the appointed and
34 currently serving members. ~~The Notwithstanding Title 1, section 403-A, the board~~
35 ~~may use video conferencing and other technologies to conduct its business but is not~~
36 ~~exempt from Title 1, chapter 13, subchapter 1.~~ Members of the board, its
37 subcommittees or its staff may participate in a meeting of the board, subcommittees
38 or staff via video conferencing, conference telephone or similar communications
39 equipment by means of which all persons participating in the meeting can hear each
40 other, and participation in a meeting pursuant to this subsection constitutes presence
41 in person at such meeting.

Sec. B-3. 39-A MRSA §151, sub-§5, as amended by PL 2003, c. 608, §9, is further amended to read:

5. Voting requirements; meetings. The board may take action only by majority vote of its membership. ~~The Notwithstanding Title 1, section 403-A, the board may hold sessions at its central office or at any other place within the State and shall establish procedures through which members who are not physically present may participate by telephone or other remote-access technology.~~ Regular meetings may be called by the executive director or by any 4 members of the board, and all members must be given at least 7 days' notice of the time, place and agenda of the meeting. A quorum of the board is 4 members, but a smaller number may adjourn until a quorum is present. Emergency meetings may be called by the executive director when it is necessary to take action before a regular meeting can be scheduled. The executive director shall make all reasonable efforts to notify all members as promptly as possible of the time and place of any emergency meeting and the specific purpose or purposes for which the meeting is called. For an emergency meeting, the 4 members constituting a quorum must include at least one board member representing management and at least one board member representing labor.

SUMMARY

This bill implements the majority recommendation of the Right To Know Advisory Committee.

Part A authorizes the use of remote-access technology to conduct public proceedings. Subject to the following requirements, it authorizes a body to conduct a public proceeding during which a member of the body participates in the discussion or transaction of public or government business through telephonic, video, electronic or other similar means of communication.

1. The body must adopt a policy that authorizes such participation and establishes the circumstances under which a member may participate when not physically present.

2. Notice of any proceeding must be provided in accordance with the Freedom of Access Act.

3. A quorum of the body must be physically present, except that under certain emergency circumstances, a body may convene a public proceeding by telephonic, video, electronic or other similar means of communication without a quorum assembled physically at one location.

4. Members of the body must be able to hear and speak to each other during the proceeding.

5. A member who is participating remotely must identify the persons present in the location from which the member is participating.

6. All votes taken during the public proceeding must be taken by roll call vote.

1 7. Each member who is not physically present and who is participating through
2 telephonic, video, electronic or other similar means of communication must have
3 received, prior to the proceeding, any documents or other materials that will be discussed
4 at the public proceeding, with substantially the same content as those documents actually
5 presented.

6 8. A member of a body who is not physically present may not vote on any issue
7 concerning testimony or other evidence provided during the public proceeding if it is a
8 judicial or quasi-judicial proceeding.

9 9. If a body conducts one or more public proceedings using remote-access
10 technology, the body must also hold at least one public proceeding annually during which
11 all members of the body in attendance are physically assembled at one location.

12 Under current law, the following state agencies are authorized to use remote-access
13 technology to conduct meetings: the Finance Authority of Maine, the Commission on
14 Governmental Ethics and Election Practices, the Emergency Medical Services' Board and
15 the Workers' Compensation Board. Part B provides a specific exemption from the new
16 requirements for the Small Enterprise Growth Board, the Emergency Medical Services'
17 Board and the Workers' Compensation Board.

Public Proceedings: remote participation by members

Email responses from query to State FOA Contacts

AGENCY	REMOTE PARTICIPATION
State Treasurer	Do not have regularly scheduled meetings where off-site members participate
Maine Turnpike Authority	No remote participation; would be nice for a member with a conflict to call in
State Auditor	No public body
Office of Professional and Occupational Regulation, Department of Professional and Financial Regulation	OPOR and affiliated licensing boards do not permit board members to participate in board meetings via phone or other electronic connections. (Witnesses are permitted to testify at adjudicatory hearings via telephone.)
Maine State Board of Nursing	Board conducts public meetings, but participate in person only
Department of Corrections	No public meetings in the way other departments do, so probably does not apply
Department of Environmental Protection	Do not hold public meetings remotely, although do provide access to the public to listen to rulemakings over the website. Although they cannot participate remotely, they can listen.
Department of Marine Resources	<p>In rare circumstances some of the boards and advisory councils do allow members to conference call into a meeting, normally only when a quorum may not be met and depends on topics to be discussed (meetings include discussing changes in regulation, consideration and approval for special licenses, legislative updates, etc.):</p> <ol style="list-style-type: none"> 1. DMR Advisory Council 2. Lobster Advisory Council 3. Lobster Zone Councils 4. Sea Urchin Zone Council 5. Scallop Advisory Council 6. Commercial Fishing Safety Council 7. Shellfish Advisory Council
Maine Human Rights Commission	May conduct an emergency telephonic Commission meeting if notify local representatives of the media and make a reasonable effort to notify the parties affected by the meeting. See 2009 memo.

Public Proceedings: remote participation by members

AGENCY	REMOTE PARTICIPATION
Public Utilities Commission	<p>Three commissioners who typically hold public deliberations once a week. Occasionally, one or two may be out of town and telephone into deliberations which would be broadcast throughout the Commission's hearing room for those in the room and can be heard over the internet at the PUC's website. The sound recording is also archived on the PUC website.</p> <p>No quorum or attendance requirements apply to hearings; all hearings are transcribed so absent commissioner can read the transcript.</p>
Maine Emergency Management Agency, Department of Defense, Veterans and Emergency Management	<ul style="list-style-type: none"> • State Emergency Response Commission: meets quarterly, occasionally has members participate remotely via teleconference and/or webinar-style internet connection • River Flow Advisory Commission: meets at least annually, occasionally also has similar remote participation
Maine Historic Preservation Commission	<p>Quarterly meetings – made one exception in last ten years: member participated by speaker phone (could not drive from York to Augusta for health reasons)</p>
Maine Drug Enforcement Agency, Department of Public Safety	<p>MDEA Advisory Board meetings using teleconferencing if one or more members participate from a location other than the actual location of the proceedings.</p>
University of Maine System	<p>UMS Board of Trustees Bylaws: A Trustee who cannot be in physical attendance may participate and vote by telephone, or other similar interactive technology where the Chair has determined on the record that the physical presence of the non-attending Trustee is prevented by an exceptional occasion which makes it inadvisable or impossible to attend the meeting. The presence of the non-attending Trustee in this manner shall be counted towards a quorum.</p> <p>Committees and subcommittees may meet by interactive technology.</p>
Workers' Compensation Board	<p>Specifically authorized in 39-A §151, sub-§5</p> <p><i>The board may hold sessions at its central office or at any other place within the State and shall establish procedures through which members who are not physically present may participate by telephone or other remote-access technology.</i></p>

Public Proceedings: remote participation by members

AGENCY	REMOTE PARTICIPATION
Finance Authority of Maine (FAME)	<p>Authorized; used only in rare and unique cases</p> <p>10 §971. Actions of the members</p> <p><i>Seven members of the authority constitute a quorum of the members. The affirmative vote of the greater of 5 members, present and voting, or a majority of those members present and voting is necessary for any action taken by the members. No vacancy in the membership of the authority may impair the right of the quorum to exercise all powers and perform all duties of the members.</i></p> <p><i>Notwithstanding any other provision of law, in a situation determined by the chief executive officer to be an emergency requiring action of the members on not more than 3 days' oral notice, an emergency meeting of the members may be conducted by telephone in accordance with the following.</i></p> <p>1. Placement of call. <i>A conference call to the members must be placed by ordinary commercial means at an appointed time.</i></p> <p>2. Record of call. <i>The authority shall arrange for recordation of the conference call when appropriate and prepare minutes of the emergency meeting.</i></p> <p>3. Notice of emergency meeting. <i>Public notice of the emergency meeting must be given in accordance with Title 1, section 406 and that public notice must include the time of the meeting and the location of a telephone with a speakerphone attachment that enables all persons participating in the telephone meeting to be heard and understood and that is available for members of the public to hear the business conducted at the telephone meeting.</i></p>
Commission on Governmental Ethics and Election Practices	<p>Authorized to hold telephonic meetings under certain circumstances:</p> <p>21-A §1002, sub-§2</p> <p>2. Telephone meetings. <i>The commission may hold meetings over the telephone if necessary, as long as the commission provides notice to all affected parties in accordance with the rules of the commission and the commission's office remains open for attendance by complainants, witnesses, the press and other members of the public. Notwithstanding Title 1, chapter 13, telephone meetings of the commission are permitted:</i></p> <p><i>A. During the 28 days prior to an election when the commission is required to meet within 2 business days of the filing of any complaint with the commission; or</i></p> <p><i>B. To address procedural or logistical issues before a monthly meeting, such as the scheduling of meetings, deadlines for parties' submission of written materials, setting of meeting agenda, requests to postpone or reschedule agenda items, issuing subpoenas for documents or witnesses and recusal of commission members.</i></p>

Public Proceedings: remote participation by members

AGENCY	REMOTE PARTICIPATION
Maine Emergency Medical Services Board, Department of Public Safety	Specifically authorized 32 §88, sub-§1, ¶D <i>The board may use video conferencing and other technologies to conduct its business but is not exempt from Title 1, chapter 13, subchapter 1. Members of the board, its subcommittees or its staff may participate in a meeting of the board, subcommittees or staff via video conferencing, conference telephone or similar communications equipment by means of which all persons participating in the meeting can hear each other, and participation in a meeting pursuant to this subsection constitutes presence in person at such meeting.</i>

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(10/2/2013 5:35:00 PM)

Memo

Date: March 5, 2009
To: Patricia E. Ryan, Executive Director
From: John P. Gause, Commission Counsel
Re: Emergency Commission Meetings

You asked for my opinion on whether we may conduct an emergency Commission meeting by telephone, and, if so, what we are required to provide in terms of notice. This was necessitated by the storm cancellation of Monday's meeting and the fact that there were a few cases listed on Monday's Agenda that have statutes of limitations that will expire before the next scheduled Commission meeting. I have concluded that we may conduct an emergency telephonic Commission meeting provided that we notify local representatives of the media and make a reasonable effort to notify the parties affected by the meeting.

A. Telephonic Meeting

The Maine Human Rights Act ("MHRA") and the Maine Freedom of Access Law do not specifically address whether a meeting may be conducted by telephone. The MHRA provides that "[T]he Commission shall have the power . . . To meet and function at any place within the State." 5 M.R.S.A. § 4566(2). The Freedom of Access Law provides, in relevant part, that "all public proceedings shall be open to the public, any person shall be permitted to attend any public proceeding and any record or minutes of such proceedings that is required by law shall be made promptly and shall be open to public inspection." 1 M.R.S.A. § 403.

Although I could not find any Maine decisions on point, the majority view in other jurisdictions is to allow public meetings to be conducted by telephone. *See, e.g., Babac v. Pennsylvania Milk Marketing Bd.*, 613 A.2d 551, 553 (Pa. 1992); *Freedom Oil Co. v. Illinois Pollution Control Bd.*, 655 N.E.2d 1184, 1190 (Ill.App. 4 Dist. 1995) (collecting cases); 2 Am Jur 2d Administrative Law § 86 ("A quorum may be found even where some members participate through a telephone conference call on a speaker telephone."). *But see Roanoke City School Bd. v. Times-World Corp.*, 307 S.E.2d 256, 259 (Va. 1983) (opposite conclusion).

Given the majority view and the fact that the MHRA and the Freedom of Access Law do not prevent it, I think that the Commission may conduct a meeting by telephone. In light of the language in the Freedom of Access Law requiring that public proceedings be open to the public, however, such a meeting should be scheduled to take place in a public location (such as the Commission's offices), and the Commissioners who participate by phone should be on a speaker phone. In this way, any members of the public who are present will be able to hear the entire discussion.

B. Required Notice

With respect to notice, the Freedom of Access Law provides that, for meetings generally, “notice shall be given in ample time to allow public attendance and shall be disseminated in a manner reasonably calculated to notify the general public in the jurisdiction served by the body or agency concerned.” 1 M.R.S.A. § 406. *See also Crispin v. Town of Scarborough*, 1999 ME 112, ¶¶ 25-27, 736 A.2d 241, 249 (one-day notice and posting in a newspaper was sufficient for a meeting in which the parties had been participating regularly in the proceedings). For an “emergency meeting,” however, the Freedom of Access Law only requires that the local media be notified. *See* 1 M.R.S.A. § 406 (“In the event of an emergency meeting, local representatives of the media shall be notified of the meeting, whenever practical, the notification to include time and location, by the same or faster means used to notify the members of the agency conducting the public proceeding.”). I did not find any Maine cases defining an “emergency meeting.”

Our Procedural Rule § 2.08 also addresses Commission decisions under “Emergency Procedure” as follows:

If the preliminary investigation of the complaint persuades the Commission's Executive Director or other designated employee that a situation comparable to those described in 5 M.R.S.A. 4612(4)(B) exists, the Executive Director or other designated employee shall so notify the Commission. As soon as practical after notification, the Commissioners will consider the matter by means of a special meeting or other appropriate method. The Executive Director or other designated employee will take all reasonable steps to notify the parties of the special meeting or other appropriate method and of their right to participate.

One question is whether a case involving the potential lapse of a statute of limitations in a pending case is even grounds to invoke this emergency procedure. To be such a case, it must involve a “situation comparable to those described in 5 M.R.S.A. 4612(4)(B).” *Id.* Although § 4612(4)(B) does not specifically include it, I think an impending lapse of the two-year court statute of limitations is “comparable” to those that are listed. *Compare* 5 M.R.S.A. 4612(4)(B)(4) (including cases in which discrimination victim is in danger of suffering severe financial loss or severe hardship as a result of unlawful discrimination).

In sum, when we are conducting an emergency meeting, such as the one in the present case involving the impending lapse of a statute of limitations, the Maine Human Rights Act and the Freedom of Access Law only require us to provide the following notice of the meeting:

- (1) Local representatives of the media shall be notified of the meeting, whenever practical, the notification to include time and location, by the same or faster means used to notify the members of the agency conducting the public proceeding. 1 M.R.S.A. § 406.

- (2) The Executive Director or other designated employee will take all reasonable steps to notify the parties of the special meeting or other appropriate method and of their right to participate. MHRC Procedural Rule § 2.08.



*Maine's
Public
Universities*

UNIVERSITY OF MAINE SYSTEM

**Testimony of the University of Maine System
LD 258, An Act to Implement the Recommendations of the Right To Know
Advisory Committee Concerning Meetings of Public Bodies
May 14, 2013**

Senator Valentino. Representative Priest. Members of the Joint Standing Committee on Judiciary. I am Ryan Low, Executive Director of Governmental and External Affairs for the University of Maine System. I am here today to testify neither for nor against LD 258, An Act to Implement the Recommendations of the Right to Know Advisory Committee Concerning Meetings of Public Bodies.

The University of Maine System fully supports the public's right to fully participate in Board of Trustee's meetings, whether full board meetings or committee meetings. We greatly appreciate the guidance that LD 258 would provide to meetings conducted through telephonic, video, electronic or other similar means of communication.

Our 16 Board members come from all corners of the state. While a physical presence at our Board meetings is and has been the norm, requiring a quorum of the body to be physically at the location of all standing committee meetings, as proposed in Part A, 1C of the bill, would be extremely challenging. It would be nearly impossible to carry out the current level of Board engagement with a physical presence requirement due to the number of committee meetings and the time and travel commitments necessary.

The Bylaws of the University of Maine System require that the Board must meet a minimum of once a quarter. Currently the Board is meeting 6 times annually. In addition, we have 8 standing committees that meet regularly.

As envisioned in the legislation, the University of Maine System has adopted policies around quorums and physical presence at meetings. Under our current bylaws around full Board meetings state:

"A Trustee who cannot be in physical attendance may participate and vote by telephone, or other similar interactive technology where the Chair has determined on the record that the physical presence of the non-attending Trustee is prevented by an exceptional occasion which makes it inadvisable or impossible to attend the meeting. The presence of the non-attending Trustee in this manner shall be counted towards a quorum."

Our bylaws provide that committees and subcommittees may meet by interactive technology.

We believe that the language adopted by our Trustees strikes the right balance between the public's right to have full access to all UMS board, committee and subcommittee meetings and the unique challenges of scheduling regular meetings with Trustees scattered in all corners of Maine.

As the Committee moves into work session on LD 258, we ask that you consider amending or removing the physical presence requirement in Part A, 1C. If amended, we would respectfully suggest including "exceptional circumstances" language around full board meetings and full participation by the various technologies available for committee and subcommittee meetings.

I want to thank the Committee for the opportunity to testify this afternoon and I would be happy to answer any questions that you might have.



Board of Trustees

Audit & Finance/Facilities Joint Session

October 30, 2012 from 9:00 am to 12:00 noon

System Office, Bangor - Rudman Board Room

USM, 327 Wishcamper Center, Portland

UMA - Room 208, Student Center

UMF - 343 Education Center

UMPI - Executive Conference Room, Preble Hall

Attendance List

**Audit Committee
Members:**

Kurt Adams, Chair
Samuel Collins
Norman Fournier
Mark Gardner

Marjorie Medd

Victoria Murphy

**Finance Committee
Members:**

Samuel Collins
Norman Fournier, Chair

Gregory Johnson
Tyler Hadyniak
Marjorie Medd
Paul Mitchell

Victoria Murphy

Karl Turner

Faculty & Student Representatives:

Bob Rice, Fac. Rep/UM

Melinda Torrens, Grad. St. Rep/USM

Staff:

Kelley Wiltbank
Rebecca Wyke
Tracy Elliott
Darla Reynolds
Chip Gavin
Miriam White

Guests:

Renee Bishop, BerryDunn
Amanda Butterfield, BerryDunn
Janet Waldron, UM
Dick Campbell, USM
Bill Bertram, USM

Not Participating:

Michelle Hood
Ray Albert, Fac. Rep/UMFK
Chancellor Page

POLYCOM LOCATIONS

**UMS -Rudman
Board Room**

Trustee Fournier
Trustee Medd
Trustee Mitchell
Robert Rice
Kelley Wiltbank
Rebecca Wyke
Tracy Elliott
Darla Reynolds
Miriam White
Renee Bishop
Amanda Butterfield
Janet Waldron

**USM, 327 Wishcamper Center,
Portland**

Trustee Adams
Trustee Gardner
Trustee Johnson
Trustee Murphy
Trustee Turner
Melinda Torrens
Chip Gavin
Dick Campbell
Bill Bertram

**UMA - Room 208, Student
Center**

**UMF - 343 Education Center
Trustee Hadyniak**

**UMPI - Exec. Conf. Room,
Preble Hall
Trustee Collins**



STATE OF MAINE
PUBLIC UTILITIES COMMISSION

THOMAS L. WELCH
CHAIRMAN

DAVID P. LITTELL
MARK A. VANNOY
COMMISSIONERS

HARRY LANPHEAR
ADMINISTRATIVE DIRECTOR

May 14, 2013

Honorable Linda M. Valentino, Senate Chair
Honorable Charles R. Priest, House Chair
Committee on Judiciary
100 State House Station
Augusta, Maine 04333

**Re: LD 258, An Act to Implement the Recommendations of the Right to Know
Advisory Committee Concerning Meetings of Public Bodies**

Dear Senator Valentino and Representative Priest:

The Public Utilities Commission (Commission) testifies neither for nor against LD 258, An Act to Implement the Recommendations of the Right to Know Advisory Committee Concerning Meetings of Public Bodies.

LD 258, as drafted, would limit the Commission's ability to conduct its public deliberations concerning adjudicatory and quasi-adjudicatory matters with two of three Commission members participating by telephone except in a specifically defined emergency situations. The three Commissioners currently deliberate cases once a week, typically on Tuesday at 10:00 a.m. The Commission deliberates and votes on cases at each deliberative session. Cases are the subject of sometimes voluminous prefiled testimony and earlier hearing in front of the Commissioners and staff. Each Commissioner reviews the record in each case prior to deciding it. Notice of these sessions is posted on the Commission's website and all parties and interested persons to cases to be deliberated are notified of the deliberation on the previous Wednesday. The Commission broadcasts its deliberations over the internet and they are also recorded and archived on our website so anyone interested can listen to the deliberations after they occur.

Title 35-A M.R.S. § 108-A establishes that a quorum of two of three Commissioners is necessary for the Commission to act. Occasionally a Commissioner needs to call into deliberations, typically due to weather or attendance at a regional utility meeting. On rare occasions, two Commissioners may need to call into deliberations. The Commission's telebridge is connected to the sound system in the Commission's hearing room, so anyone participating by phone can be heard in the room and clearly recorded. Besides Commission deliberations, it also could be necessary for two Commissioners to call into a hearing or other meeting which meets the FOAA law's definition of public proceeding.

LOCATION: 101 Second Street, Hallowell, ME 04347

MAIL: 18 State House Station, Augusta, ME 04333-0018

PHONE: (207) 287-3831 (VOICE)

TTY: 711

FAX: (207) 287-1039

11

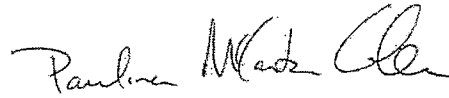
The Commission respectfully requests that the bill be amended to allow for language similar to that contained in Section B-3 of the bill that would allow the Commission to use videoconferencing or teleconferencing in the conduct of its proceedings and allow a quorum to be established if one or more Commissioners are participating by video or teleconference. Suggested language is as follows:

35-A M.R.S.A. § 108-A. Commission action; quorum; notice

A majority of the duly appointed commissioners constitutes a quorum and the act or decision of a majority of commissioners present, if at least a quorum is present, is the act or decision of the commission in any formal proceeding before the commission. Notwithstanding Title 1, section 403-A(1)(C) and (2), commissioners may participate in proceedings through telephone, video, electronic or other similar means of communication.

The Commission looks forward to working with the Committee on LD 258.

Sincerely,



Paulina McCarter Collins, Esq.
Legislative Liaison

cc: Judiciary Committee Members
Margaret Reinsch, and Susan Johannesman, Legislative Analysts

Maine Legislature

Judicial Committee

Senator Valentino, Rep. Priest and members of the Judicial Committee thank you for allowing me to comment on LD 258 "An Act to Implement the Recommendations of Right To Know Advisory Committee Concerning Meetings of Public Bodies".

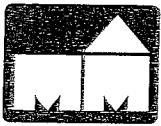
My name is Percy L. Brown, Jr., I live in Deer Isle, Maine. I have been a Hancock County Commissioner for eleven years and I am a current member of the Right to Know Committee. I have served on many State and local Boards over the past 25 years. I am requesting this committee amend LD 258 and not allow "Elected Officials" to conduct public proceeding through other means of communication. This bill will work well for appointed board and council members but most County Commissioners, Town Selectmen, elected School Board members and Town Councilors are elected by the people and access through public proceeding should always be available to the public. As you all know nothing can be more persuasive than a room full of concerned citizens. The information presented at these proceeding may sway the vote and from my experience often does. It is easier to make a decision on difficult issues when the member is not physically present. Remote technology is great but the public should always be allowed to have face time with their elected officials and question or support decisions they make as it insures greater transparency in government.

Thank You,

Percy L. Brown, Jr.

Hancock County Commissioner

Ellsworth, ME



Maine Municipal Association

60 COMMUNITY DRIVE
AUGUSTA, MAINE 04330-9486
(207) 623-8428
www.memun.org

Testimony of the Maine Municipal Association

In Support of LD 258

An Act To Implement the Recommendations of the Right To Know Advisory Committee Concerning Meetings of Public Bodies

May 14, 2013

Senator Valentino, Representative Priest, members of the Judiciary Committee, my name is Garrett Corbin and I am testifying in support of LD 258 on behalf of the Maine Municipal Association.

MMA's 70-member Legislative Policy Committee voted to support LD 258 at its March 7th meeting.

It is clear that the Right To Know Advisory Committee expended considerable effort in developing the process created in LD 258 to expressly allow for elected officials to participate in public meetings when physically unable to attend. MMA appreciates the thoughtfulness of these recommendations from the Right To Know Advisory Committee and agrees with the results.

Legislative Subcommittee

Draft: Policy standards concerning encryption of radio transmissions

Sec. 1. 25 MRSA §2803-B, sub-§1, ¶N is enacted to read:

§2803-B. Requirements of law enforcement agencies

1. Law enforcement policies. All law enforcement agencies shall adopt written policies regarding procedures to deal with the following:

A. Use of physical force, including the use of electronic weapons and less-than-lethal munitions;

B. Barricaded persons and hostage situations;

D. (CONFLICT: Text as amended by PL 2011, c. 640, Pt. D, §1) Domestic violence, which must include, at a minimum, the following:

(1) A process to ensure that a victim receives notification of the defendant's release from jail;

(2) A process for the collection of information regarding the defendant that includes the defendant's previous history, the parties' relationship, whether the commission of an alleged crime included the use of strangulation as defined in Title 17-A, section 208, subsection 1, paragraph C, the name of the victim and a process to relay this information to a bail commissioner before a bail determination is made;

(3) A process for the safe retrieval of personal property belonging to the victim or the defendant that includes identification of a possible neutral location for retrieval, the presence of at least one law enforcement officer during the retrieval and giving the victim the option of at least 24 hours notice to each party prior to the retrieval; and

(4) Standard procedures to ensure that protection from abuse orders issued under Title 19-A, section 4006 or 4007 are served on the defendant as quickly as possible;

D. (CONFLICT: Text as amended by PL 2011, c. 680, §4) Domestic violence, which must include, at a minimum, the following:

(1) A process to ensure that a victim receives notification of the defendant's release from jail;

(2) A process for the collection of information regarding the defendant that includes the defendant's previous history, the parties' relationship, the name of the victim and a process to relay this information to a bail commissioner before a bail determination is made;

(3) A process for the safe retrieval of personal property belonging to the victim or the defendant that includes identification of a possible neutral location for retrieval, the presence of at least one law enforcement officer during the retrieval and giving the victim the option of at least 24 hours' notice to each party prior to the retrieval;

(4) Standard procedures to ensure that protection from abuse orders issued under Title 19-A, section 4006 or 4007 are served on the defendant as quickly as possible; and

(5) A process for the administration of a validated, evidence-based domestic violence risk assessment recommended by the Maine Commission on Domestic and Sexual Abuse,

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Draft: Policy standards concerning encryption of radio transmissions

established in Title 5, section 12004-I, subsection 74-C, and approved by the Department of Public Safety and the conveyance of the results of that assessment to the bail commissioner, if appropriate, and the district attorney for the county in which the domestic violence occurred.

- E. Hate or bias crimes;
- F. Police pursuits;
- G. Citizen complaints of police misconduct;
- H. Criminal conduct engaged in by law enforcement officers;
- I. Death investigations, including at a minimum the protocol of the Department of the Attorney General regarding such investigations;
- J. Public notification regarding persons in the community required to register under Title 34-A, chapters 15 and 17;
- K. Digital, electronic, audio, video or other recording of law enforcement interviews of suspects in serious crimes and the preservation of investigative notes and records in such cases;
- L. Mental illness and the process for involuntary commitment; and
- M. Freedom of access requests. The chief administrative officer of a municipal, county or state law enforcement agency shall certify to the board annually that the agency has adopted a written policy regarding procedures to deal with a freedom of access request and that the chief administrative officer has designated a person who is trained to respond to a request received by the agency pursuant to Title 1, chapter 13; and

N. Encryption of radio transmissions.

The chief administrative officer of each agency shall certify to the board that attempts were made to obtain public comment during the formulation of policies.

2. Minimum policy standards. The board shall establish minimum standards for each law enforcement policy pursuant to subsection 1 with the exception of the freedom of access policy under subsection 1, paragraph M. Minimum standards of new mandatory policies enacted by law must be adopted by the board no later than December 31st of the year in which the law takes effect.

3. Agency compliance. The chief administrative officer of each law enforcement agency shall certify to the board no later than January 1st of each year that the agency has adopted written policies consistent with the minimum standards established or amended by the board and that all officers have received orientation and training with respect to new mandatory policies or new mandatory policy changes pursuant to subsection 2. New mandatory policies enacted by law must be implemented by all law enforcement agencies no later than the July 1st after the board has adopted the minimum standards.

4. Penalty.

5. Annual standards review. The board shall review annually the minimum standards for each policy to determine whether changes in any of the standards are necessary to incorporate improved

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Draft: Policy standards concerning encryption of radio transmissions

procedures identified by critiquing known actual events or by reviewing new enforcement practices demonstrated to reduce crime, increase officer safety or increase public safety.

Sec. 2. Encryption of radio transmissions. In establishing the minimum policy standards governing the encryption of radio transmissions described in the Maine Revised Statutes, Title 25, section 2803-B, subsection 1, paragraph N, the Board of Trustees of the Maine Criminal Justice Academy shall ensure that the public continues to have the same access to radio transmissions of law enforcement and other first responders as available under the encryption practices of law enforcement and other first responders that were in effect January 1, 2013.

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Right to Know Advisory Committee
Encryption Subcommittee
July 16, 2012
Meeting Summary

Convened 9:16 a.m., Room 438, State House, Augusta

Present:

Rep. Joan Nass
Linda Pistner
AJ Higgins
Joe Brown
Mike Cianchette
Mal Leary
Judy Meyer

Absent:

Perry Antone

Staff:

Curtis Bentley
Peggy Reinsch

Introductions

Linda Pistner called the meeting to order at 9:16 a.m. and asked all the members to introduce themselves.

Suzanne Goucher, Maine Freedom of Information Coalition and Maine Association of Broadcasters

Ms. Goucher reiterated the concerns outlined in the Maine Freedom of Information Coalition's letter of April 27, 2012 to the Maine Right to Know Advisory Committee regarding the possible increase in the encryption of radio transmissions by public safety agencies after switching from the current analogue radio system to a digital radio system. Ms. Goucher said agencies are moving to a digital radio system to improve interagency operability but is concerned the switch will impede the media's ability to obtain public safety information that is readily accessible through the current analogue system. The media uses analogue scanners as its primary tool to monitor public safety matters. Ms. Goucher said there isn't any concern about digitally encrypting those communications that are currently encrypted (hostage negotiations, tactical, SWAT Team transmissions, etc.) but any expansion would cause headaches and foster paranoia and fear in the public. She also stated that it should be fairly easy for law enforcement and interested parties to prepare a mutually agreed upon list of communications that should remain encrypted.

Department of Public Safety, Lt. Col. Raymond Bessette

Lt. Col. Bessette said the state is using an antiquated 1974 radio system that is no longer supported and is difficult to maintain. He stated that the department will not encrypt any transmissions under the digital system that had not always been encrypted under the old system. Lt. Col. Bessette likened the move to digital to switching from AM to FM and stated that the switch itself will not encrypt the information but people will need to purchase a digital scanner to listen in. He said that Region-Net will simultaneously rebroadcast transmissions in analogue so public safety partners not switching to digital can hear transmissions and scanners will be able to pick up those transmissions.

Lt. Col. Bessette said the department does not have any protocols or rules on encryption and each agency has the ability to decide what transmissions should be encrypted. He said no one is asking for additional encryption because each entity wants the ability to know what the others are doing. He did not think the Maine Criminal Justice Academy did any training on encryption, only the operation of the radio system.

Lt. Col. Bessette expressed his opinion that this is really a public policy question of whether the public has a right to access these transmissions.

Office of Information and Technology-Wayne Gallant.

Mr. Gallant said there is a common misunderstanding that digital implies encryption which it does not; encryption would be done on top of going to digital. His office is working on MSCOMNET to consolidate radio communications for all state agencies under one system instead of several different ones. Mr. Gallant said MSCOMNET should be operating in the fall of 2013.

The FCC mandated that states narrowband communications by January 2013.

General Discussion.

Broadcasters' concerns about encryption are not at the state level but at the local level. The media wants to preserve what is available now and is concerned the switch over may result in more transmissions being encrypted. They are not too concerned about police going off-radio after initial call by using cell phones, texts and laptops because the media will have been alerted to the situation by the initial radio broadcast.

While encryption isn't a problem in Maine, the policy discussion needs to happen before it becomes a problem.

Encryption doesn't necessarily protect the transmissions because there is always someone who will be able to put in the effort to access encrypted messages but the general public will be the ones without access.

Next meeting.

The next meeting is scheduled for Wednesday, August 8, 2012 at 9:00 a.m. in room 438, State House, Augusta.

The subcommittee asked staff to search for any federal rules or laws dealing with encryption and to talk with AG criminal attorneys about Maine's law regarding encryption.

The subcommittee also asked the Department of Public Safety to provide a list of subject matter and situations that should be confidential.

The meeting was adjourned at 10:10 a.m.

Respectfully submitted,
Curtis Bentley and Peggy Reinsch

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Right to Know Advisory Committee
Encryption Subcommittee
August 15, 2012
Meeting Summary

Convened 9:20 a.m., Room 438, State House, Augusta

Present:

Rep. Joan Nass (arrived 9:20 a.m.)
Linda Pistner
Perry Antone
AJ Higgins (arrived 9:30 a.m.)
Joe Brown
Mike Cianchette
Mal Leary
Judy Meyer

Staff:

Curtis Bentley

Introductions

Linda Pistner called the meeting to order at 9:20 a.m. and asked all the members to introduce themselves.

Review of federal and state laws pertaining to encryption, Curtis Bentley, staff.

At the request of the subcommittee, Curtis Bentley provided information about the applicability of federal and state laws to the encryption (scrambling) of certain police and first responder radio transmissions. The subcommittee discussed the potential applicability of Maine's Freedom of Access Act (1 MRSA, chapter 13) and Maine's law regarding the inception of wire and oral communications (15 MRSA, chapter 102). The subcommittee asked Assistant Attorney General Laura Yustak Smith about the applicability of the state prohibition against the interception of oral communications to en route radio transmissions. Ms. Smith said that encrypted radio transmissions might be considered "oral communications" as defined in the statute because the act of encrypting radio transmissions could indicate an expectation that the communications are not open to the public. Title 15 MRSA § 709, sub-§ 5 defines "oral communications" to mean "any oral communications uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation."

In sum, Mr. Bentley did not find a federal or state statute or regulation that authorizes, prohibits or provides guidance on the encryption of police or first responder radio transmissions. It appears that it is within the discretion of an agency or entity making such radio transmissions whether or not to scramble a particular radio transmission.

Department of Public Safety, Maine State Police, Major Grotton, Lt. Pomelow, Col. Williams.

Major Grotton said the goal of the department is to keep general radio transmissions open and transparent to the public and that there are no plans to encrypt anything beyond what has always been encrypted. Moving to a digital system will require people who want to listen in on those calls to use a compatible scanner but nothing new will be encrypted. Major Grotton said that encrypted radio transmissions are not recorded so there wouldn't be a record for purposes of FOA. He was not aware of any agency that plans to increase its use of encryption.

Major Christopher Grotton was unaware of any investigations under the interception of wire and oral communication laws and felt that the kind of technology available today was not contemplated when those laws were enacted.

In response to a question from the subcommittee, Major Grotton estimated that approximately 1-2% of all radio transmissions (approximately 55 tactical operations annually) are encrypted. He noted that it is critical they remain encrypted and the department would be very concerned about anyone breaking into those transmissions.

Major Grotton said it is the on-scene commander who makes the decision to switch to an encrypted frequency. He thought the public would be aware of an encrypted transmission because the initial call would be audible and then there wouldn't be any other radio traffic regarding that matter. If encryption becomes too prevalent it should be reviewed as a policy issue.

Lt. Don Pomelow informed the subcommittee that the state will need a number of FCC licenses for its digital bandwidth; each municipality and county must obtain its own license. FCC licenses do not dictate the use of encryption.

Col. Williams stated that currently there isn't an issue with encryption and there are no plans to increase its use because the police derive benefits from having transmissions open to the public. He provided examples of receiving information from the public in response to radio calls and the public avoiding accident scenes. He said that there are ways for police to communicate now without the use of the radio but they want and need the public to hear what is going on.

Col. Williams cautioned the subcommittee against recommending a change in the law that would encourage officers to use private means of communication. He stated that the department only uses encryption for public safety and the safety of the department's officers and that they will continue to find ways to protect officer and public safety even if the use of encryption is regulated in the future.

Subcommittee general discussion

Mal Leary stated that there are real concerns about encryption and there needs to be accountability as encryption has been used at the federal level and by other states to avoid the detection of illegal behavior such as racial profiling and some agencies have started encrypting all calls.

A.J. Higgins suggested that there needs to be a balance between the needs of the police/ first responders and public access. This is a valid issue to explore even if it isn't a huge issue right now. He felt this is a community relations issue.

Perry Antone said that there has been considerable confusion caused by the switch from analogue to digital and that going digital does not mean increased encryption. He also said there isn't anything in law that prevents the use of encryption but agencies have used it very little because it is important for them to freely share information between agencies. Radio dispatches are the most efficient way to get information to and from agencies and encryption limits that efficiency. Mr. Antone expressed concern that the subcommittee is working off assumptions that something will happen when there is no evidence that going from analogue to digital will encourage more encryption. He stated that the law doesn't need to be changed because there isn't a problem to fix and any changes could have far reaching unforeseen affects. He pointed out that if en route radio transmissions become "public records" then we will have to figure out a way to protect confidential information sent via these transmissions as is currently required for written records which isn't feasible.

Linda Pistner suggested that FOA was not intended to deal with oral communications and if there is a policy issue to resolve it may be better dealt with under some other section of law.

Judy Meyer reiterated that she just wants to maintain the current level of public access because that is working for everyone. She would like to see the current practice of encrypting put in writing either in policy or statute so everyone is aware of the protocol and also to reduce the possibility that the current practices will be changed with the arrival of new technology. Ms. Meyer agreed that there isn't a problem in Maine yet but it has become one in other states so should do something now.

Joe Brown said that we need to be careful not to impede police operations by removing the ability to encrypt certain types of calls. He suggested that the subcommittee could continue to watch the issue and if a problem arises. He said there isn't a problem that needs to be addressed today.

Mike Cianchette felt that what is happening out there now is working so it might be worthwhile to ask State Police to formally adopt a policy or guidelines for encrypting transmissions. Putting the current practice on paper might be helpful.

Subcommittee actions. The Encryption Subcommittee took the following actions.

A.J. Higgins made a motion to recommend to the full committee that no changes be made to current law. The motion was seconded by Joe Brown. The subcommittee voted 8-0 in favor of the motion.

The subcommittee unanimously agreed to recommend to the full RTK Committee that it send a letter to the Board of Trustees of the Maine Criminal Justice Academy requesting that it adopt an encryption policy for police that reflects the current practice and to have the board report back to the RTK Committee on any decisions or actions taken pursuant to this request.

Next meeting.

The subcommittee did not schedule an additional meeting.

The meeting was adjourned at 11:05 a.m.

Respectfully submitted,
Curtis Bentley

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Perry B. Antone, Sr.
Public Safety Director

Virginia McDonald
Administrative Assistant



Jason J. Moffitt
Deputy Police Chief

Christopher M. Martin
Police Lieutenant

October 2, 2013

RTAC Legislative Subcommittee

Dear Committee Members:

I am writing this letter on behalf of the Maine law enforcement community in response to the Right to Know Advisory Committee's desire to regulate the encryption of radio transmissions. The law enforcement community has serious concerns about this matter. Our understanding is that, if regulation in the form of legislation and further mandates were to take place, it would limit the ability of law enforcement agencies to encrypt radio transmissions in the future.

On one hand, the desire to regulate encryption appears to be an attempt to solve a nonexistent problem. Since 2001 law enforcement, EMS and fire services have been steadily working toward radio interoperability. A movement among any of these entities toward encrypting their radio traffic would hinder this effort. Furthermore, the expense of encryption coupled with limited public safety budgets also leads us to believe that we will not see public safety agencies moving en masse toward encryption. The transition to narrow band / digital frequencies is a separate issue from encryption and should not be confused with it.

On the other hand, we see no reason to further prohibit public safety agencies from obtaining this technology if they have the ability to do so. Much of the information already transmitted across police frequencies is NOT public information according to Maine Statutes. Names of victims, identifying information and addresses occasionally MUST be transmitted over the air due to the emergency nature of emerging situations. I, and other members of the law enforcement community I have spoken with, am aware of no law prohibiting these transmissions. It is true that this information can and is, at times, briefly transmitted over the air for the public to hear, however this does not make the information "public" as far as right to know laws are concerned. It is currently well established that not all information contained on recordings of law enforcement radio traffic is accessible to the public. As an example, criminal justice information with non-conviction data would not be considered "public access." There are also specific laws (i.e HIPPA) that can apply to EMS and fire department traffic as well.

We believe that existing public access legislation adequately balances the needs of law enforcement to keep certain information private with the right to know of the public. Current practices and commonly available technology that most police departments already employ (i.e. cell phones and mobile data terminals) already keep much information from being broadcast over the radio. Limiting the ability of law enforcement agencies to encrypt radio traffic could push them to rely on cell phones and mobile data terminals more frequently. This could have the effect on increasing response times, since encrypted radio traffic could, in some cases, be the most rapid manner in which to dispatch officers to time sensitive incidents in which confidential information must be broadcast.

I appreciate your consideration in this matter. I look forward to speaking with individual members and urge you to contact me if you would like to discuss the matter further.

Sincerely,

Perry B. Antone, Sr.
Director of Public Safety
Brewer Police Department

Law Enforcement Representative
Right to Know Advisory Committee